UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICK ORAM, on behalf of him self and on behalf of all other similarly situated persons,

Plaintiff,

-against-

SOULCYCLE LLC, SOULCYCLE HOLDINGS LLC, SOULCYCLE 384 LAFAYETTE STREET, LLC, SOULCYCLE 350 AMSTERDAM, LLC, SOULCYCLE 609 GREENWICH STREET, LLC, SOULCYCLE BRIDGEHAMPTON, LLC, SOULCYCLE EAST 18TH STREET, LLC, SOULCYCLE EAST 63RD STREET, LLC, SOULCYCLE EAST HAMPTON, LLC, SOULCYCLE ROSLYN LLC, SOULCYCLE SCARSDALE LLC, SOULCYCLE TRIBECA, LLC, SOULCYCLE WEST 19TH STREET, LLC, SOULCYCLE BRENTWOOD, LLC, SOULCYCLE SANTA MONICA, LLC, and SOULCYCLE WEST HOLLYWOOD, LLC,

Defendants.

Civ. No.: 13-CV-2976(RWS)

ECF Case

MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(F), TO SEVER PLAINTIFF'S CALIFORNIA CLAIMS AND PARTIES PURSUANT TO FED. R. CIV. P. 21 AND TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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Defendants SoulCycle LLC, SoulCycle Holdings, LLC, SoulCycle 384 Lafayette Street, LLC, SoulCycle 350 Amsterdam, LLC, SoulCycle 609 Greenwich Street, LLC, SoulCycle Bridgehampton, LLC, SoulCycle East 18th Street, LLC, SoulCycle East 63rd Street, LLC, SoulCycle East Hampton, LLC, SoulCycle Roslyn, LLC, Soul Cycle Scarsdale, LLC, SoulCycle Tribeca, LLC, SoulCycle West 19th Street, LLC, SoulCycle Brentwood, LLC, SoulCycle Santa Monica, LLC, and SoulCycle West Hollywood, LLC (collectively hereinafter "Defendants" or "SoulCycle") respectfully submit this Reply Memorandum of Law in Further Support of their Motion to Strike Portions of Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(f), to Sever Plaintiff's California Claims and Parties Pursuant to F.R.C.P. 21 and to Dismiss Plaintiff's Amended Complaint Pursuant to F.R.C.P. 12(b)(6) ("Defendants' Motion").[1]

ARGUMENT

I. PLAINTIFF HAS NOT ALLEGED A MINIMUM WAGE CLAIM UNDER NEW YORK LAW.

Plaintiff's primary argument in opposition to Defendants' Motion to Dismiss his minimum wage claim is that NYLL requires employers to pay employees minimum wage for all hours worked. While that is a true statement, that argument misses the point of Defendants' motion. NYLL §652 does not require that an employee be paid at an hourly rate. Rather it requires that the total wages paid to the employee are equal to or greater to the applicable minimum wage rate times the number of hours worked by the employee. See NYLL § 190(1) (defining wages as "the earnings of an employee for labor services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis"). See N.Y. COMP. CODES R. & REGS. ("NYCRR") tit. 12, § 142-2.16 ("The term regular rate shall mean the amount that the employee is regularly paid for each hour of work. When an employee

[1] A copy of Plaintiff's Amended Complaint ("Amended Complaint") is attached as Exhibit "A" to the Declaration of William J. Anthony ("Anthony Decl.") in Support of Defendant's Motion.

is paid on … a basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings.") Here, Plaintiff was paid on an "other basis" as specifically allowed for by NYLL § 190(1).

As Plaintiff concedes, when determining whether an employee has been paid minimum wage under the federal Fair Labor Standards Act ("FLSA"), courts have divided the total amount of wages paid to the plaintiff per week by the number of hours worked per week. New York courts have consistently held that the same standards and analysis apply to minimum wage claims under the NYLL as under the FLSA. Lundy v. Catholic Health Sys. Of Long Island, Inc., 711 F.3d 106, 118 (2d Cir. 2013) (holding that the FLSA and the NYLL use the same standard in determining liability for minimum wage and overtime pay); see also Severin v. Project OHR, Inc., 10 Civ. 9696 (DLC), 2012 U. S. Dist. LEXIS 85705, *35 (S.D.N.Y. Jun. 20, 2012) (finding that as putative plaintiffs in a class action were paid $136.95 for each shift totaling a potential 16 compensable hours, putative plaintiff's rate of compensation was $8.55 per hour which was greater than the applicable minimum wage rate); see also Rodriguez v. Queens Convenience Deli Corp., 09-cv-1089(KAM)(SMG), 2011 U.S. Dist. LEXIS 120478, *5-8 (E.D.N.Y. Oct. 18, 2011) (calculating minimum wage owed under both FLSA and the NYLL by subtracting the total amount worked per week from the total of the applicable minimum wage rate multiplied by the total number of hours worked in the same week). In this case, it is undisputed that Plaintiff was paid according to the terms of a written agreement and well known practice which provided that Plaintiff would be paid each week based on the number of classes taught. Accordingly, the legal issue is whether dividing the number of hours worked into Plaintiff's earnings resulted in the minimum wage being earned.

Plaintiff's employment agreement, as conceded by him in his Opposition, defined 'services' to be performed as the following: teaching a certain number of classes per week,

attending staff meetings, continuing education sessions, compiling playlists, contributing to the SoulCycle website, being available for press at SoulCycle's request and arriving early for class to set up new riders. See Morris Aff. Exhibit "1;" (Pl. Opp. 4). The language in Plaintiff's employment agreement then reads: "[f]or all services to be rendered by [Plaintiff] in connection with [Plaintiff's] employment hereunder, [SoulCycle] shall pay compensation" on a per-class basis. Id. (emphasis added). Thus, for all work duties performed, Plaintiff earned compensation based on the number of classes he taught each week. Accordingly, to correctly determine Plaintiff's rate of pay, one must calculate the total amount of wages Plaintiff earned per week (his total number of classes, multiplied by his per class pay) and divide it by the number of hours Plaintiff alleges he worked (the number of hours teaching, plus the number of hours performing the additional services enumerated in his employment contract as covered under his per class rate). Plaintiff's conclusory allegations that his per class pay was only meant to cover 45 minutes of class time, not only directly contradict his employment agreement and regular course of dealing between Plaintiff and Defendants, but are insufficient to survive a motion to dismiss. See generally Bell Atl. Corp. v. Twombly, 550 U. S. 544, 555 (2007); Walz v. 44 & X, 12 Civ. 5800(CM), 2012 U.S. Dist. LEXIS 161382, *11 (S.D.N.Y. Nov. 7, 2012) (finding that simply stating Plaintiffs were not paid for overtime work does not sufficiently allege a wage and hour violation). Instead, Plaintiff would need to plead with specificity how this "other basis" of payment led to him not being paid the minimum wage, something he has not done nor attempted to do. Accordingly, his claim under NYLL §650 *et seq.* fails as a matter of law.

Realizing that New York law compromises his legal position, Plaintiff asks the Court to apply California law to his claims. There is no legal basis for doing so and the Court should decline Plaintiff's invitation in this regard. California courts have held that "the averaging method used by the federal courts for assessing a violation of the federal minimum wage law

does not apply to California law-based claim s." Cardenas v. McLane Foodservices, Inc., 796 F. Supp. 2d 1246, 1252 (C.D. Cal. 2011). In direct contradiction, and as discussed in detail above, New York courts have consistently stated that minimum wage claims under the NYLL should be analyzed under the same standard as the FLSA. Lundy, Inc., 711 F.3d at 118. Further, New York courts have consistently used the federal averaging method to determ ine minimum wage damages. See Severin, 2012 U.S. Dist. LEXIS 85705 at *35; Rodriguez, 2011 U.S. Dist. LEXIS 120478 at *5-8. Finally, the New York State Depa rtment of Labor has regulated that to determine an employee's regular rate when the em ployee is paid on a basis other than an hourly rate, as in the instant case, "the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings." NYCRR § 142-2.16.

Accordingly, Plaintiff's first claim for relief should be dismissed.

II. PLAINTIFF'S CLAIM OF UNLAWFUL DEDUCTIONS UNDER NYLL §193 IS DUPLICATIVE OF HIS CLAIMS FOR MINIMUM WAGE AND SHOULD BE DISMISSED FOR THE SAME REASONS.

Plaintiff's Second and Th ird Claims for Relief[2] duplicate Plaintiff's First Claim for relief, nam ely, by a rguing that Plaintiff wa s not paid wages for tim e worked outside of the time spent actually teaching clas ses. (Am. Compl. ¶¶88, 94). [3] As detailed above, Plaintiff's employment agreement specifies that his per cla ss rate was paym ent for the time spent teaching classes as well as all other serv ices in connection with his em ployment as enum erated in the

[2] To the exte nt Plaintiff's T hird Claim alleges that De fendants unlawfully deducted the cost of business related expenses from Plaintiff's wages, Defendants will address said argument in the following section.

[3] Plaintiff's cited cases in support of his NYLL §193 claim are easily distinguishable from the case at hand. In all, a defendant employer failed to p ay a p laintiff alleged incentive compensation and the court needed to determine whether such compensation equaled wages under NYLL. See Farricker v. Penson Dev., Inc., 07 Civ. 11191 (DAB), 2009 U.S. Dist. LEXIS 27484 (S.D.N.Y. Mar. 31, 2009) (holding that per an agreement, plaintiff sufficiently pled a §193 claim a s the alleged 'Participation Payments' payable at the c ompletion of ce rtain Deals were wages for purposes of §193 and accordingly cannot be withheld by the employer); Aledia v. HSH Nordbank AG, 08 Civ. 4342 (BSJ), 2009 U.S. Dist. LEXIS 24953 (S.D.N.Y. 2009) (denying employer's motion to dismiss as it was unclear whether plaintiff's bonus payments, as defined in her contract, had properly vested, and were therefore wages under §193); Wachter v. Kim, 920 N.Y.S.2d 66 (1st Dep't 2011) (reversing lower court's dismissal of a § 193 claim as plaintiff's salary, wages and bonuses term sheet promised plaintiff a m inimum guaranteed compensation that overrode the discretionary nature of the individual pay components.)

employment agreement. Accordingly, Plaintiff was paid at an above minimum wage rate for all hours he alleges he worked for Defendant. Therefore, as Plaintiff's Second and Third claims rest on his allegations that he was not paid any wages, let alone minimum wage, for hours worked outside of class time, his claims fail for the same reason above – that, pursuant to his employment contract, all hours spent performing services and teaching classes were paid pursuant to his per class rate which averages out to significantly above minimum wage.[4]

III. PLAINTIFF'S CLAIMS UNDER NYLL FOR EXPENSE REIMBURSEMENTS FAIL BECAUSE HE ALWAYS EARNED IN EXCESS OF THE MINIMUM WAGE.

It is well-settled under New York law that employers do not have to reimburse employees for business expenses, including "tools of the trade," so long as not doing so does not reduce the employee's wage below the minimum wage. See Lin v. Benihana Nat'l Corp., 755 F. Supp. 2d 504, 511-12 (S.D.N.Y. 2010) (finding that employers may require employees to bear the costs of acquiring and maintaining the tools of the trade (in Lin, modes of transportation for plaintiff delivery people) "so long as those costs, when deducted from the employee's weekly wages, do not reduce their wage to below the required minimum");[5] Maldonado v. La Nueva Rampa, Inc., 10 Civ. 8195 (LLS)(JLC), 2012 U.S. Dist. LEXIS 67058, *25 (S.D.N.Y. May 14, 2012) (holding that "as each of the [p]laintiffs earned below minimum wage, they are entitled to a credit for [business related] expenses.") Plaintiff has provided no support for his contention that part (a)[6] of 12 NYCRR § 142-2.10 provides a "blanket protection" and prohibits deductions

[4] Plaintiff fails to provide any support for his argument that Defendant cannot use 'piece rate' pay (nor does he recognize that Defendant's Motion never states specifically that they are using a piece rate pay). Further, Plaintiff's claims that California law are persuasive here are again without basis, for the same reasons detailed above.

[5] Plaintiff's argument that Lin does not apply to the instant case because it was based on a "repealed inapplicable restaurant-industry wage regulation" incorrectly focuses on the court's holding concerning uniform maintenance and not on the court's holding concerning plaintiffs' tools of the trades, which is applicable to the instant case

[6] "Wages shall be subject to no deductions, except for allowances authorized in this Part, and except for deductions authorized or required by law."

for business expenses over and above the protection provided in part (b) [7] of 12 NYCRR § 142-2.10, thereby making part (b) superfluous. (Pl. Opp. At 13) Courts have read §142-2.10(a) specifically as prohibiting "deductions for spoilage or breakage;… deductions for cash shortages or losses; [or imposing] fines or penalties for lateness, misconduct or quitting by an employee without notice" and have found §142-2.10(b) to prohibit employers from reducing the "***minimum wage*** for expenses incurred by an employee in carrying out duties assigned by an employer." Lewis v. Alert Am bulette Serv. Corp., 11- CV-442(JBW), 2012 U.S. Dist. LEXIS 6269, *14 (E.D.N.Y. Jan. 19, 2012) (emphasis added).

Accordingly, as Plaintiff always earned above minimum wage for all hours worked, his conclusory allegations that he was never reimbursed for alleged business expenses are not enough to support a claim under the NYLL §193.

IV. PLAINTIFF HAS FAILED TO PLEAD A CLAIM OF RETALIATION UNDER NYLL §215.

Plaintiff's claims for retaliation fail under the prevailing case law for the simple fact that Plaintiff was not an employee when he first complained of Defendant's actions and because the act complained of (SoulCycle informing him and his attorney that they are no longer allowed to take a SoulCycle class) would not be considered retaliatory under NYLL § 215. In support of his claim, Plaintiff cites to several cases prohibiting post-employment retaliation under federal and state ***anti-discrimination*** laws. (Pl. Opp. at 15). Such cases are not instructive in the instant case. First, unlike NYLL § 215, which specifically provides protection for an "employee" who has suffered from retaliation, N.Y. Exec. Law §296(1)(e) ("NYSHRL" – the New York state counterpart to Title VII), provides protection against retaliation against any "person." Under the canons of statutory interpretation, when the legislature uses particular language in one

[7] "The minimum wage shall be not be reduced by expenses incurred by an employee in carrying out duties assigned by an employer."

area and different language in another, the presumption is the word choice was intentional. See e.g. United States v. Peterson, 394 F.3d 98, 107 (2d Cir. 2005) ("When Congress uses particular language in one section of a statute and different language in another, we presume its word choice was intentional"). This is further supported by Title VII case law which allows for post-termination retaliation claims, whereas, as discussed below, wage and hour retaliation claims require the complaint to have been made while the plaintiff was employed. Accordingly, one should presume the Legislature intentionally meant to use the broader term "individual" in its anti-retaliation provision under the NYSHRL, tracking Title VII, and the narrower term "employee" under NYLL §215.

The Court should not rely on the outlier holding in Liverpool v. Con-Way, Inc., 08-CV-4076 (JG)(JO), 2009 U.S. Dist. LEXIS 41349 (E.D.N.Y. May 15, 2009) (denying a motion to dismiss where plaintiff claimed defamatory statements about a failed drug test, cost him future employment, were made in response to plaintiff's filing for unemployment was retaliatory under NYLL §215.) Several wage and hour cases, decided after Liverpool, in this Circuit, have specifically held that "[t]o establish a prima facie case under [§215], the plaintiff must adequately plead that ***while employed by the defendant***, [he] made a complaint about the employer's violation of the law and, as a result, was … subjected to an adverse employment action." Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 302 (S.D.N.Y. 2011); see also Paz v. Piedra, 90 Civ. 03977 (LAK)(GWG), 2012 U.S. Dist. LEXIS 4034, *30 (S.D.N.Y. Jan. 12, 2012) (finding that plaintiff must have made the complaint "while employed by the defendant" to establish a prima facie case); Reilly v. Natwest Markets Group, Inc., 178 F. Supp. 2d 420, 427 (S.D.N.Y. 2011) ("New York Labor Law §215(1) applies to retaliatory actions taken by an employer against an employee"). Accordingly, because Plaintiff did not make his complaint until after his termination, his retaliation claim fails as a matter of law.

Further, assuming *arguendo*, Plaintiff's claim for retaliation could survive the deficiencies described above, the alleged retaliatory act, Defendants' statement to Plaintiff and his counsel that they were no longer permitted at SoulCycle, does not trigger the protection of NYLL §215. In determining whether an action is retaliatory under NYLL §215, courts have looked to whether the alleged adverse employment action "might have dissuaded a reasonable worker from making or supporting similar charges." Copantitla, 788 F. Supp. 2d at 303. Courts have found viable retaliation claims where the employer has filed a false criminal charge against the employee, discharged the employee, or reduced the employee's hours, thereby reducing his pay. See Id. at 304-05; Paz, 2012 U.S. Dist. LEXIS 4034 at *33. Plaintiff's allegations that he was kept from attending SoulCycle classes does not rise to the level of such retaliation. Further, Plaintiff's claim that his counsel being informed that he could no longer take a SoulCycle Class would "have a chilling effect" and likely discourage attorneys from representing employees to the extent it may otherwise "inconvenience" their lives is devoid of legal merit.

V. PLAINTIFF'S CALIFORNIA CLAIMS SHOULD BE SEVERED

Plaintiff's California Claims and the California Defendants [8] should be severed from the instant action pursuant to Fed. R. Civ. P. Rule 21 in the interests of judicial economy and efficiency. Plaintiff's own proposal of two separate and distinct classes, with separate and distinct legal claims attached to each class, highlights the severability of the claims in question.

Despite Plaintiff's best attempts to argue otherwise, as shown above, the applicable New York law is not significantly similar to the applicable California law. Further, as with Plaintiff, each putative class member's terms of employment are likely to be governed by

[8] Plaintiff's Fifth, Sixth, Seventh, Eighth and Ninth causes of action all involve California law and are collectively hereinafter referred to as the "California Claims." Defendants, SoulCycle Brentwood, LLC, SoulCycle West Hollywood, LLC, and Soul Cycle Santa Monica, LLC (collectively, hereinafter referred to as the "California Defendants") are California corporations.

individual employment agreements. It is likely that the putative class members of the proposed California Class, live in California. Further, it is likely that additional witnesses for the California claims live in California, where the alleged violations took place. Courts have often severed the claims of plaintiffs who reside and were injured out of the court's jurisdiction. See Costello v. Home Depot U.S.A., Inc., 888 F. Supp. 2d 258, 264-66 (D.Conn. 2012) (finding that the relevant factors, including the substantial factual differences between the different plaintiffs, despite their sharing a job description, as well as concerns for jury confusion favored severance of non-Connecticut claims into separate actions); Wilkes v. Genzyme Corp., Civ. No. WMN-10-1683, 2011 U.S. Dist. LEXIS 49881 (D. Md. May 10, 2011) (finding that even if the differences in the substantive law of the six states were minor, the potential for jury confusion was great where plaintiffs alleged wage and hour violations solely under state law, on behalf of Plaintiffs who were employed by Defendant in six different states); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296-97 (9th Cir. 2000) (holding that the district court did not abuse its discretion when it severed the claims of three of the ten plaintiffs, as, among other reasons, not severing their claims would lead to potential prejudice to the defendants in part due to legal confusion as the jury would have had to evaluate state law claims under the differing laws of each plaintiff's state); Boschert v. Pfizer, Inc., No. 4:08-CV-1714(CAS), 2009 U.S. Dist. LEXIS 41261 (E.D. Mo. May 14, 2009) (granting severance of the non-resident state plaintiffs, in part because multiple sets of jury instructions would be required to encompass the laws from multiple states); Acevdeo v. Allsup's Convenience Stores, Inc., 600 F.3d 516, 522 (5th Cir. 2010) (holding that courts have considerable discretion in determining whether trying claims together would be too challenging logistically in light of the different witnesses and documentary proof required for each putative plaintiff's alleged claim.) Plaintiff's proposed common questions of law and fact alone do not support a denial of Defendants' Motion to Sever. See Erausquin v. Notz, Stucki Mgmt.

(Bermuda) Ltd., 806 F. Supp. 2d 712, 722 (S.D.N.Y. 2011) ("Nor is this Court required to deny Defendants' severance motion merely because there exist some common question of law and fact. The Court of Appeals has never required claims to be litigated together on that basis alone.) In light of the above, Defendants will suffer prejudice if the California Claims are brought with the New York Claims in front of a New York jury. Accordingly, severance of all California claims, as well as the California Defendants, is appropriate.

VI. IRRELEVANT AND INFLAMATORY PORTIONS OF PLAINTIFF'S AMENDED COMPLAINT SHOULD BE STRICKEN

The prejudicial statements made in Plaintiff's Preliminary Statement serve no purpose but to inflame the reader and accuse Defendants of unsavory actions not at issue in the instance. (See e.g. Am. Compl. ¶1, alleging Defendants mistreated and cheated their customers) As discussed in further detail in Defendants' Motion, all such prejudicial and inflammatory statements should be stricken. See Morse v. Weingarten, 777 F. Supp. 312, 319 (S.D.N.Y. 1991).

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that this Court should (1) sever the California Claims and Parties, and (2) dismiss, with prejudice, Plaintiffs' first and second claims for relief, as to wage claims under the NYLL, Plaintiffs' third claim for relief for unlawful deductions under the NYLL, brought on behalf of Plaintiff Nick Oram and the putative class members for failure to state a claim and Plaintiff's tenth claim for relief for retaliation brought on his own behalf for failure to state a claim, and (3) strike the prejudicial portions contained within the first Paragraph of the Amended Complaint.

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Dated: September 20, 2013
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2013, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Southern District's Local Rules, and/or the Southern District's Rules on Electronic Service upon the following parties and participants:

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